IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 732 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GIRISHBHAI NATVARBHAI PATEL - Appellant

Versus

STATE OF GUJARAT & 1 - Respondents

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Appearance :

MR BHARGAV N BHATT for Appellant
MR KC SHAH, Ld. APP for Respondent No. 1
MR SURESH S PATEL for Respondent No. 2

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 25/11/2005

ORAL JUDGMENT

1.The appellant, i.e. the original complainant has preferred this appeal under section 378 of the Code of

Criminal Procedure challenging the order of acquittal dated 12/11/2003 passed by learned 4th JMFC, Navrangpura, Ahmadabad (Rural) in Criminal Case No. 564 of 2001, acquitting the present Respondent no.2 / original accused of the charges under section 138 of Negotiable Instrument Act (hereinafter referred to as the 'Act'). This Court granted leave vide order dated 7/5/2004 (Coram: C.K. Buch, J).

2. The case of the complainant could be summarised as under:

The complainant and accused were friends and know each other since long. The complainant was in the construction business at Ahmedabad. The complainant developed 900 sq. meter land in Ahmadabad City, Taluka Ghatlodiya and constructed 8 Row Houses. The Row House No. G/183 was sold to the accused for consideration of Rs.13,61,000=00. As per the understanding between the complainant and accused the payment of consideration i.e. Rs.13,61,000=00 was to be made by the accused and the papers like allotment letter, share certificate, receipt etc. were to be issued in the name of one Devendra Chandulal Bhavsar. According to that

understanding between the complainant and the accused all the relevant papers were delivered to the accused along with possession of the Row House No. G/183. The accused also signed an indemnity bond dated 19/8/2000 to this effect. The accused issued following cheques in the name of the complainant;

(i)Cheque No: 150124 dated 7/3/2001 for Rs.7,61,000/- drawn on Bank of Baroda, Naranpura Branch, Ahmedabad;

(ii)Cheque No.: 150125 dated 2/3/2001 for Rs.6,00,000/- drawn on Bank of Baroda, Naranpura Branch, Ahmedabad.

Accused assured the complainant that the said cheques would be duly honoured and complainant will receive the amount mentioned in the cheque. The complainant relying upon the assurance of the accused handed over the possession of papers of Row House No. G/183 to the accused.

The complainant thereafter as per the instruction of the accused presented the aforesaid two cheques in

his bank, i.e. Kheralu Nagrik Sahkari Bank, Sola Road, Ahmedabad on 5/3/2001 and 8/3/2001. Both the cheques were returned with the endorsement “Funds Insufficient” and “Today's balance insufficient” respectively. The complainant's bank intimated the complainant about return of the cheques with the written memo on 8/3/2001. The complainant thereafter issued a notice through his advocate to the accused calling upon him to make payment of the amount mentioned in the cheques. The notice was issued on 13/3/2001 by registered post and also under the postal certificate. It is the say of the complainant that the notices have been received by the accused on 16/3/2001. The accused did not make the payment against returned cheques. The complainant filed complaint on 16/4/2001 before the competent court of Metropolitan Magistrate, Ahmadabad, which came to be registered as Criminal Case No. 564 of 2001. It is the case of the complainant / appellant that the accused appeared before the Court and asked for an adjournment for settling the matter with complainant on 7/6/2001. It is stated by the appellant that the accused thereafter requested for further adjournment on the ground of settling terms for compromise. The accused submitted a purshish on 24/7/2001 declaring to the

trial court that he has already paid an amount of Rs.5,00,000=00 against the cheque amount of Rs.13,61,000=00 and the remaining amount of Rs.8,61,000=00 would be paid to the complainant within a period of 1 ½ months. Thus, this compromise has arrived at between the parties. This purshish was in a nature of declaration as it contains clearly that this is a declaration to the Court duly signed by the accused who was identified by his advocate.

3.It appears from the record that the accused thereafter changed the advocate and filed an application dated 27/9/2001 for cancelling / withdrawing the earlier purshish / declaration at exhibit-9 which was submitted by him on 24/7/2001 on the ground that said purshish / declaration was not filed by him. The accused further stated in his application dated 27/9/2001 that, his signature was obtained on a blank paper by the complainant only for the purpose of seeking adjournment in the matter. In other words the accused submitted that he had signed the blank paper and given it to the complainant for the purpose of seeking adjournment. The application of the accused dated 27/9/2001 was kept for hearing

by the trial court. As it appears from record the trial court recorded plea on 27/9/2001 at exhibit-12. The accused applicant did not press for exhibit-11 application in view of the fact that the plea was recorded at exhibit-12 by the court. The exhibit-11 contains an endorsement on the part of the advocate of the accused made on 8/11/2001 that as the court has issued charge sheet and recorded plea at exhibit-12, he was not pressing the application at that stage.

4. The complainant was examined and his testimony is recorded at exhibit-13. The complainant has completely supported his version in the complaint. The complainant has stated in his testimony that in the Sarvoday Society there were total 8 row houses built, each of 160 sq. yard. The row house No. G/183 was purchased by the accused pursuant to his meeting with the complainant in presence of one common friend Bhupendrabhai Natvarlal Shah. At that time the accused had also brought with him one Devendrabhai Bhavsar, in whose name the share certificate of the row house, possession letter, were to be delivered. The complainant has narrated in his testimony the incident

of selling of row house No. G/183 and delivering the papers and possession to the accused and receiving the cheque for the amount of consideration against the sale of the concerned row house. In his cross examination a suggestion came to be made that such cheques were never issued and at the best they were issued by way of guarantee only. The suggestion was put that no resolution or permission for sale is produced nor has any date been mentioned for selling the subject row house. It was also elicited from the complainant that he does not remember the exact date and month for finalizing the sale of the row house. The accused has not adduced any independent evidence, except one memorandum of understanding between the complainant and one Bhupendrabhai Natvarlal Shah in support of the suggestion that the amount of Rs.8,61,000=00 as a consideration for row house No. G/183 is liable to be paid by Shri. Bhupendrabhai Natvarlal Shah. This memorandum of understanding dated 20/11/2000 came to be exhibited at exhibit-23. The complainant has also produced indemnity bond purported to have been executed by the accused / respondent no.2. The indemnity bond at exh. 16 does not contain date of its execution. The notice sent by registered A.D. and UPC is at exhibit-17

calling upon the accused to pay the cheque amount. The notice dated 13/3/2001 seems to have been duly served upon the accused. The accused has chosen not to reply to the notice. As noticed herein above one document purported to have been Memorandum of Understanding between the complainant and one Bhupendrabhai Natvarlal Shah dated 20/11/2000 was sought to be produced on behalf of the accused under application at exhibit-22. The trial court allowed the same and exhibited the said document at exhibit-23. One Kishor Ratilal Rathodia, Branch Manager of Bank of Baroda is examined and his testimony has been recorded at exhibit-28 which corroborates the facts that the cheques had been presented and they were returned for “insufficient funds”. The said testimony is recorded at exhibit-29. The memos where under the cheques were returned have been produced at exhibit-30 and 31. The relevant extract of the cheque returned is produced at exhibit-22. One Jitendrabhai Maganlal Shah of Kheralu Nagrik Sahkari Bank to which the cheques were presented has been examined and his testimony is recorded at exhibit-40. The accounts statement of Kheralu Nagrik Sahkari Bank Ltd run dated 24/3/2003 is produced at exhibit-42.

5. The accused has chosen not to examine any witness except producing one Memorandum of Understanding between the complainant and one Bhupendrabhai Natvarlal Shah. In the cross examination of the complainant suggestions were made to indicate that there was no transaction worth the name between the complainant and the accused. The cheques at the best were therefore required to be treated as guarantee and it can not be said that the complainant had successfully established his entitlement to, and the accused's liability for payment of the cheques amount. Learned trial Judge has also permitted advocate of the parties to make their written submissions which have been placed on record at exhibit-46 and 48 respectively. Further statement of the accused came to be recorded on page 75 below exhibit-12, wherein the accused has completely denied the case of the prosecution, though the accused has stated that the cheques in question were given to one Shri. Bhupendrabhai and in turn the same might have been given by Bhupendrabhai to the complainant and the case is therefore concocted and filed with a view to exert undue pressure on him.

6. The trial court has after perusing the evidence and

hearing the parties framed two issues; namely (1) whether the accused has committed an offence punishable under Negotiable Instrument Act, 1938 on the return of two cheques bearing no. 150124 for Rs.7,61,000 and No. 150125 for Rs.6,00,000=00 given to the complainant for his subsisting liability, and on his failure in making payment pursuant to the legal notice issued by the complainant demanding the cheques amount from the accused ? (2) what order ?

7. The Issue No.1 is answered in negative and Issue No.2 is answered as per his final order.

8. After discussing the matter at length the trial court has come to the conclusion that the accused deserves to be honourably acquitted under section 255 (1) of the Code. The order of acquittal dated 12/11/2003 passed in Criminal Case No. 564 of 2001 is impugned in the present appeal.

9. Learned advocate Shri. Bhatt has submitted on behalf of the appellant that the impugned order is perverse, unreasonable, bereft of any reasoning and therefore the same deserves to be quashed and set aside. Shri. Bhatt

has submitted that the trial court has not appreciated the material evidence produced on record in its true perspective. Shri. Bhatt has submitted that the scheme of the Negotiable Instrument Act ought to have been borne in mind while assessing the material on record and the testimony of the witnesses. The salutary provision contained in section 139 of the Act, 1881 makes it incumbent upon the court to presume that cheques received by complainant were in discharge of liability or any other debt. The accused was required to dislodge the presumption by leading cogent and positive evidence. Shri. Bhatt has submitted that, in the instant case it was thus bounden duty cast upon the accused to dislodge the presumption that the cheques in question were issued in discharge of any existing liability or debt. The simple reading of section 139 of the Act unequivocally makes it clear that the accused i.e. the drawer of the cheque has to prove it that they were not issued by him against any debt or for discharge of any debt or liability. The presumption is not merely required to be rebutted but it is required to be positively proved by the accused or the drawer that the cheques were not issued against discharge of any liability or debt. In absence of any such cogent

evidence on the part of the accused the trial court ought not to have come to the conclusion that the cheques were not issued against any existing liability. Shri. Bhatt has submitted that the trial court ought to have appreciated the fact that the requirement of the act and especially Section 138 and 139 were completely met with when the complainant produced the cheques which were duly signed by the accused and the accused has nowhere denied signature on the cheques. Out of the two cheques, on one cheque i.e cheque at exhibit-15, the accused had appended his signature near the correction, when the date of cheque came to be altered. Reading this evidence with the purshish declaration at exh.9 left no scope whatsoever for the trial court to come to any contrary conclusion as it has done and, therefore, the impugned order suffers from patent illegality, perversity and therefore it has resulted into miscarriage of justice, requiring it to be quashed and set aside.

10. Shri Bhatt, learned advocate for the appellant has relied upon the decision of the Apex Court in case of **K.N.BEENA VS. MUNIYAPPAN AND ANOTHER,** reported in AIR 2001 SC p.2895 in support of his contention that in

cases under the Negotiable Instrument Act, the burden of proving that the cheque was not issued against any debt or consideration is on the accused or the drawer. The trial Court has not appreciated the requirement of Section 139 of the Negotiable Instrument Act, and proceeded on the wrong presumption that the complainant was required to prove the existence of any liability or requirement of paying any consideration on the part of the accused. The Apex Court in terms stated that under Section 139 of the Negotiable Instrument Act, the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge in whole or in part of a debt or liability for which the cheque was issued. The burden of proving that the cheque had not been issued against any liability of debt is on the accused. The Apex Court observed in the case that accused has to prove in the trial by leading evidence that there was no debt or liability for which the cheques were issued. Looking to the evidence on record, it cannot be said that the accused /respondent No. 2 had discharged this burden of proving that cheques were not issued against any liabilities. Shri Bhatt has also relied upon the Apex Court observation in case of **HITEN P. DALAL VS.**

BRATINDRANATH BANERJEE, reported in AIR 2001 SC ps.3897 in support of his contention that the requirement of Section 139 is to be met by the accused by leading cogent evidence. Mere rebuttal cannot be said to be discharging the burden imposed upon the drawer under Section 139 of Negotiable Instrument Act.

11. Shri. Bhatt has also relied upon the Apex Court decision in case of **GOA PLAST (P) LTD. Vs. CHICO URSULA D'SOUZA**, reported in AIR 2004 SC p.408 in support of his contention that Section 139 of the Code makes it incumbent upon the court to presume that the cheque was issued in discharge of debt or liabilities unless, it is proved contrary by leading cogent evidence by the cheque issuing authority. The Apex Court has observed that the relationship of master servant or mercantile relation between company and the accused are of no significance.

12. Shri. Bhatt has further submitted that purshis declaration Ex.9 dated 24th July, 2002 passed by the accused under his own signature to the trial Court shall render all his earlier explanations into insignificance as it suggest that on that day, it is

unequivocally admitted by the accused that he has liability to pay the cheque amount to the complainant and 5 lacs has already been paid and remaining Rs.8,61,000=00 would be paid within a period of one and half month therefrom. Shri Bhatt has relied upon the decision of the Apex Court in case of **NAGINDAS RAMDAS VS. DALPATRAM ICCHARAM ALIAS BRIJRAM AND OTHERS**, reported in AIR 1974 SC p.471 in support of his contention that admission made in the pleading or under Section 58 of the Evidence Act by the parties or their agents at or before the hearing of the case stands on a higher footing than evidenciary admission. Shri. Bhatt has submitted that in the instant case, as could be seen from the records that accused had on many occasions sought time for settling the matter. The earlier application for adjournment Exh. 5 contains request for time to settle the matter. Again in Exh. 6 it was reiterated that time was sought for settling the matter. In light of this, Ex. 9 deserves to be viewed, which would clearly show that the accused respondent No. 2 on 24th July, 2001 has unequivocally made declaration by way of purshish before the trial Court that the amount of Rs.13,61,000=00 against two cheques numbers made thereunder is payable and out of which, 5

lacs have been paid and remaining amount of Rs.8,61,000=00 would be paid within a period of one and half months therefrom. This purshish / declaration should be viewed in its true perspective as it is observed by the Supreme Court in case of Nagindas (Supra). Shri. Bhatt has submitted that, therefore, the appellant has instructed him to restrict his claim only to Rs.8,61,000=00 as he has already received Rs. 5 lacs as indicated in the purshish Ex.9.

13. Shri. Bhatt, learned counsel appearing for the appellant has invited this court's attention to Ex.11 and submitted that accused has attempted to resile from his admission on a palpably wrong grounds, which can be established by just a look at Ex.9 purshish and Ex.11. The grounds canvassed by the accused No. 2 in Ex.11 application cannot be said to be genuine, in view of the fact that Ex.9 purshish / declaration contains at-least 4 to 5 signatures of the accused and not only one as it is suggested by him in application Ex.11.

14. Shri. Bhatt has submitted that the accused has thereafter, withdrawn the application Ex.11 by saying that it is not pressed at that stage as the plea has

been recorded. In other words, Ex.9 purshish / declaration remains on record and merely recording of plea cannot render it a nullity. Shri. Bhatt has submitted that Ex.9 remains on record especially when having made an attempt to withdraw the same and later on giving up the application Exh.11 as not pressed, would all the more go to show that Ex.9 containing admission of the liabilities remains on record. Shri. Bhatt has submitted that even in the written submission that was filed on behalf of the appellant, this plea was categorically taken in para 2 in Ex.46. The accused in his written submission, which were filed after receiving the written submission of the appellant, has not made a whisper about the same. In light of this, it was bounden duty cast upon the trial Court to deal with the contention and answer it properly. Close perusal of the entire judgment would show that the trial Court has not dealt with the admission of accused in respect of liabilities contained in Ex.9 purshish / declaration nor has he dealt with plea taken to this effect in the written statement placed at Ex.46 on behalf of complainant. Thus, the Scheme of Section 139 of Negotiable Instrument Act is not applied at all, which has rendered the entire judgment perverse and contrary

to the established provisions of law and therefore, this perversity deserves to be rectified and the appeal, therefore deserves to be allowed. Shri. Bhatt has submitted that the accused has not denied his signature on the cheques nor has he denied his counter signing of the cheques at Ex.15. The fact that the accused has under his own signature made an admission at Ex. 9 admitting his liabilities and the fact of his non-denial of the signature at Ex.9, coupled with his failure in leading any positive evidence with regard to so called absence of liabilities led to one and the only conclusion that, accused was guilty and he did not deserve to be acquitted, and therefore, the impugned order deserves to be quashed and set aside.

15. Shri. Patel, learned advocate for the Respondent no.2 – original accused has submitted that this being an acquittal appeal, this Court may not interfere with the findings of the trial court unless & until it is amply demonstrated and established by the appellant that the findings are perverse and as such no reasonable man would have arrived at on the facts & circumstances of the case. He has submitted that the complainant has miserably failed in establishing the

basic ingredient of offense under section 138 of the Act. The presumption under section 139 of the Act comes into operation only after the complainant successfully establish the case meeting all the ingredients of section 138 of the Act. Section 138 provides that the cheque is to be drawn by a person on an account maintained by him with a bank. The cheque is to be drawn for payment of any amount of money for the discharge in full or in part of any debt or any other liability and the same has been returned by the bank due to insufficiency of funds due to any reason. Shri Patel submitted that, thus, for constituting offence under section 138 of the Act, it was primary duty and liability of the complainant to establish that there was a valid commercial transaction and the cheques in question were issued by the accused in discharge and or against any existing liability. When the complainant has failed in establishing these facts before the trial and when the trial court has also recorded its findings in respect of complainant's failure in establishing that the cheques were issued against any existing liability, this court in acquittal appeal may not interfere with the judgment & order of acquittal impugned in the present appeal.

16. Shri. Patel, learned advocate for the respondent has contended that the record and testimony of the complainant, and the document of Memorandum of Understanding between the complainant and one Shri. Bhupendrabhai, came to be produced during the course of cross examination of the complainant himself, would conclusively go to show that the cheques in question were not issued by the accused against any liability or debt due to the complainant. The testimony of the complainant and especially the complainant's admission in his cross examination were sufficient enough to establish that the cheques in question were not issued for discharging any liability of the accused to the complainant. Shri. Patel has submitted that the transaction itself appears to be dubious as not a single document in respect of subject property has been produced by the complainant. It was duty cast upon the complainant to produce the documents like share certificate or copy of share certificate, possession letter or any other document in respect of the row house No. G/183 which is stated to have been sold by the complainant at the behest of the accused for the consideration of Rs.13,61,000=00, i.e. amount of two

cheques. Thus the complainant has failed in crossing the first hurdle in establishing that there was any transaction as mentioned in the complaint itself. When the complainant himself has not successfully established the transaction itself, there can not be any presumption under section 139 of the Act.

17. Shri. Patel has further submitted that the document at exhibit-23 is Memorandum of Understanding or an agreement between the complainant and one Bhupendra N. Shah. In this document it appears that the Bhuprendra N. Shah, second party has admitted his various liabilities to the complainant. It is also admitted by Bhupendrabhai N. Shah that Rs.8,61,000=00 is required to be paid by him against the difference of consideration for row house No. G/183. This document has been admitted by the complainant. This document is dated 20/11/2000 and therefore, it can well be said that the accused did not have any liability in respect of the row house No. G/183. This document at exhibit-23 deserves to be viewed in its proper perspective juxtaposing the same with the indemnity bond which does not even bear the date of its execution. Shri. Patel has submitted that these two documents coupled

with the admission of the complainant in his deposition would conclusively show that the complainant has failed in meeting with the essential requirement of section 138 so as to bring home the culpability of the accused.

18. Shri. Patel has submitted that, further explanation under section 313 of the Code deserves to be viewed properly. Shri. Patel has invited this Court's attention to the affidavit which is purported to have been affirmed by Bhupenrabhai N. Shah, though, as he did not choose to examine Shri. Bhupendrabhai N. Shah, same has not been treated to have been exhibited, proved and established. Shri. Patel has submitted that, in view of these facts & circumstances it can well be said that the complainant has miserably failed in establishing a prima-facie case that there existed any liability whatsoever, and the cheques were issued in discharge thereof by the accused. In support of his submissions Shri. Patel has also tendered written submissions which contains by & large the submissions recorded herein above and therefore, it need not be dilated upon at this stage. The written submissions were filed on behalf of the accused mainly to meet with the contentions of the appellant that exhibit-9

purshish declaration was an admission of liability on behalf of the accused and, therefore, the same document ought to have been treated to be the concluding document requiring no further evidence on the part of the complainant. In this written submission Shri. Patel has submitted that, on plain reading of purshish-9, it can not be said to be a plea of guilty by the accused. Shri. Patel has submitted that the purshish Exh. 9 merely informs the Honorable Court that originally one Bhupendrabhai N. Shah, was to pay Rs.13,61,000=00 to the present appellant original complainant has agreed by signing that agreement at Ex.23 dated 20.11.2000 and accepted the liability of payment of the amount in dispute. He has already paid Rs.5 lacs from the total amount of Rs.13,61,000=00. The Exh.9 purshish, therefore, cannot be said to be the admission either of the guilt or of the debt on the part of the accused respondent No. 2. Shri. Patel has submitted that the receipt of 5 lacs from respondent No. 2 had not been proved by the complainant and therefore, on this count, also the purshish at Ex.9 cannot be said to be an admission on the part of accused. On the contrary, as can be seen, the amount of Rs.5 lacs must have been received by the complainant from Bhupendrabhai N. Shah

in pursuance of the agreement dated 20.11.2000 and as it is in force, the present respondent No. 2 – original accused cannot be said to be liable and therefore, the acquittal order is absolutely proper and just.

19. It is further submitted by Shri. Patel on behalf of accused that facts regarding payment of Rs. 5 lacs also should be a factor to be noted that original transaction of Row House No. G/183 was only between Bhupendrabhai N. Shah and present appellant original complainant. Thus, Ex.9 purshish cannot be treated as a plea of guilty or admission regarding transaction as alleged by the complainant appellant. Shri. Patel has also submitted that Ex.23 shows that the debt or liability, if at all any was only of Bhupendrabhai N. Shah towards present appellant. Shri. Patel has submitted that even as per the complaint, the liability of respondent No. 2 arise not only on account of transaction of sale of Tenement but it arises also because of the execution of indemnity bond Ex.16 at page 101 to 103 on record. Shri. Patel has assailed Ex.16 – Indemnity Bond on the ground that (i) both the parties to the agreement has not signed the document, (ii) father's name of respondent No. 2 has been written

by pen and this very fact was placed in cross examination of the appellant and the appellant could not explain the same to the satisfaction of the Court which proves a doubtful conduct of the appellant, (iii) date of execution is kept blank and appellant complainant could not explain this in his cross-examination, (iv) Rubber stamp alleged to have been affixed is not clear except the date and no witness has been examined to prove the fact that the said document was produced by the parties for registration to the particular person or authority on a particular date so the rubber stamp cannot prove the date of execution of document in the above circumstances and submitted that this Ex.16 indemnity bond cannot be said to be inspiring any confidence and therefore, the acquittal deserves to be upheld.

20. Shri. Patel has submitted that dates mentioned in both the cheques at Ex.14 and 15 bear the date of 7.3.2001 and 2.3.2001, out of which, one date was corrected by canceling previous date of 1.9.2000 and no specific question regarding this correction of dates was put to the appellant complainant in his examination-in-chief. Thus, Ex.9 cannot be said to be

an admission of guilt or liability on the part of the respondent No. 2.

21. Shri. Patel has further submitted that main ingredient of Section 138 namely that the cheques should have been written in satisfaction of debt or liability is not satisfactorily established by the complainant and this very fact remained to be proved. It cannot be ignored in any manner at the time of deciding acquittal appeal.

22. Shri. Patel has further submitted in his written submission that other facts regarding Ex.9 are that by application Ex.11, the respondent No. 2 requested the trial Court to cancel the purshish Ex.9 by explaining the circumstances under which the signature was obtained, which was capable of creating doubt regarding the purshish.

Shri. Patel has further submitted that plea was recorded at Ex.12. The respondent No. 2 did not insist for specific order below Ex.11 and the endorsement came to be made below Ex. 11 by the advocate only after the plea was recorded at Ex. 12. Therefore, that itself

was the ground for withdrawing Ex.11 and the respondent No. 2 can not be said to be bound by the purshish Ex. 9.

Shri. Patel has also submitted that Ex.23 holding Bhupendrabhai N. Shah responsible to pay for the price of Tenement has been admitted in total terms by appellant complainant in his cross-examination and so under the provision of Section 58 of the Evidence Act, the facts admitted need not be proved by any further evidence. The respondent No. 2 has therefore, established specifically that no liability existed and this was sufficient to meet with requirement of Section 139 of the Act.

23. Shri. Patel has alternatively pleaded that this court can issue the direction to the trial Court to hold an inquiry regarding Ex.9 and 11 by permitting both the parties to lead evidence before the trial Court and report of finding of the Court may be called for, by fixing the date and meanwhile, the present appeal may be adjourned to a suitable date in the interest of justice or in the alternative, the matter may be remanded back to the trial Court for recording

evidence of both the parties and to decide according to law only with regards to Ex.9 and 11.

24. Shri. Patel has also submitted that the prosecution has thus, failed to establish and prove the offence under Section 138 of the Act and prays for dismissal of the appeal. Shri. Patel has relied upon the decision of the Apex Court in case of **SHAILENDRA PRATAP AND ANOTHER,** reported in (2003) 1 SCC p.761 in support of his contention that in absence of any perversity noticed in the judgment, High Court should not interfere in the acquittal appeal. Shri. Patel has also relied on the Apex Court decision in case of **JOSEPH VS. STATE OF KERALA,** reported in (2003) 1 SCC p.465 in support of his contention that when the trial Court gave cogent reasons for acquittal, High Court should not interfere with the acquittal merely because another view was possible. Shri Patel has submitted that the acquittal recorded by the trial Court is absolutely legal and proper and as could seen from the material on record, the accused has specifically established or at-least created doubt in the case of the appellant and therefore, the benefit of doubt must go in favour of the accused in a criminal proceedings. Shri. Patel has

also relied upon the judgment in case of **C.ANTONY Vs. RAGHVAN NAIR,** reported in 2003 Cri. L.J.p.411, in support of his contention that acquittal recorded by the trial Court for want of proof of advancement of money by complainant, could not have been entertained by the High Court without holding that the trial Court's finding was perverse. Shri. Patel has also relied upon the decision of the Apex Court in case of **DHANNA ETC. vs. STATE OF MADHYA PRADESH,** reported in AIR 1996 SC p.2478 in support of his plea that appellate Court in appeals against acquittals has to proceed more cautiously and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that the order of acquittal is liable to be interfered with or disturbed. In view of above, Shri. Patel has submitted that the appeal deserves to be dismissed as the judgment impugned does not call for any interference.

25. This Court has perused the documents and evidence on record and heard the learned counsels of the respective parties at length. The order of acquittal impugned in the present appeal deserves to be viewed in the light of the undisputed facts. The accused No. 2

has nowhere denied the factum of signing the cheques in question. The signature of the accused on the cheques in question is not disputed at all by the accused. The accused has also not disputed his signature on the indemnity bond at Ex.16. The fact of receipt of notice stands proved. The postal acknowledgment card bears signature of the accused which has not been questioned by the accused at any point of time. Mere denial of having it received by the accused, would therefore, not amount to saying that he had not received the notice in question. The trial court has also proceeded on the footing that the statutory notice was received by the accused. The accused has not issued any reply to the statutory notice issued on behalf of the complainant calling upon him to make payment against two cheques exhibit- 14 and 15. The accused has initially sought adjournment from the lower court on the ground of settling the matter with the complainant. The application for adjournment at Ex. 5 dated 7/6/2001 and Ex. 6 dated 25/6/2001 go to show that all along the accused was seeking adjournment for settling the matter with the complainant. Ex.9 purshish / declaration deserves to be viewed against this back drop. Had there been no liability on the

accused, then, in the first instance, on receipt of the very notice for making payment from the complainant, the accused could have stated without mincing words that there exist no liability. No such reply has been given by the accused to the complainant. It may be mentioned here that, even before this Court also, initially the time was sought by the accused for settling the matter. The Exh. 9 purshish / declaration in terms states that the total amount of Rs.13,61,000=00 to be paid to the complainant in respect of cheques No: 150124 and 150125 for the debt. Out of which Rs.5,00,000=00 have already been paid and remaining amount of Rs.8,61,000=00 would be paid within 1 ½ months as agreed between the parties.

26. The purshish Ex. 9 contains some corrections. At least at four places it has been countersigned by the accused himself. The purshish Exh.9 also contains the signature of advocate of the accused who has identified the accused. The signature on the purshish / declaration exh.9 and counter signature made at various places on Ex. 9 have not been denied or disputed by the accused at all. In fact the signature seems to have been admitted by the accused as it appears from the

application at Ex. 11. The purshish / declaration exh.9 dated 24/7/2001 renders all the other earlier admissions and/or submissions of acceptance of liability on the part of 3rd party into insignificance.

27. It is an established position of law that under the scheme of Negotiable Instrument Act, especially under Scheme of 118 and 139 the statutory presumption is created in favor of the complainant and the court has to presume and proceed on the basis of this presumption unless it is dislodged by the accused on the strength of leading cogent and convincing evidence in support of his claim. Section 139 of the Negotiable Instruments Act, 1881 makes it unequivocally clear that it is the duty cast upon the court to presume that the holder of a cheque receive the cheque of the nature referred to in section 138 for the discharge in whole or in part of any debt or other liability. The ratio laid down by the Apex Court in case of **HITEN P. DALAL Appellant V. BRATINDRANATH BANERJEE, Respondent**, reported in AIR 2001 S.C. pg. 3897 is clearly applicable to the facts of the present case also. In case of Hiten Halal (supra) Supreme Court has observed as under :-

“20. The appellant's submission that the cheques were not drawn for the 'discharge in whole or in part of any debt or other liability' is answered by the third presumption available to the Banks under Section 139 of the Negotiable Instruments Act. This section provides that “it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability. “The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability.

21. Because both Section 138 and 139 require that the Court “shall presume” the liability of the drawer of the cheque for the amounts for which the cheque are drawn, as noted in State of Madras v. A. Vaidyanatha Iyer, AIR 1958 SC 61, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. “It introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused” (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court “may presume” a certain state of affairs. Presumptions are rules of evidence and do not conflict with the

presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact. “

23. Judicial statements have differed as to the quantum of rebutting evidence required. In Kundan Lal Rallaram v. Custodian, Evacuee Property, Bombay, AIR 1961 SC 1316, this Court held that the presumption of law under Section 118 of Negotiable Instruments Act could be rebutted. In certain circumstances, by a presumption of fact raised under Section 114 of the Evidence Act. The decision must be limited to the facts of that case. The more authoritative view has been laid down in the subsequent decision of the Constitution Bench in Dhanvantrai Balwantrai Desai v. State of Maharashtra, AIR 1964 SC 575, where this Court reiterated the principles enunciated in State of Madras v. Vaidyanath Iyer (supra) and clarified that the distinction between the two kinds of presumption lay not only in the mandate to the Court, but also in the nature of evidence required to refute the two. In the case of discretionary presumption if drawn may be rebutted by an explanation which “might reasonable by true and which is consistent with the

> innocence” of the accused. On the other hand in the case of a mandatory presumption “the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S. 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision can not be said to be rebutted.....”

Thus the two types of presumptions discussed by the Apex Court in para-23 makes it clear that the presumption as envisaged under Section 139 is a statutory and mandatory presumption and not the discretionary presumption. The mandatory presumption can not be dislodged merely by bare explanation which may appear only plausible as it is observed by the Apex

Court that “a fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists.“ Thus, in view of this, unless there is a cogent evidence led by the accused it can not be said that he has discharged the burden.

28. On the similar line the Apex Court has also held in case of **K.N. BEENA V. MUNIYAPPAN AND ANR,** reported in AIR 2001 S.C. pg. 2895. The relevant paragraphs of the Apex Court deserves to be set out as under:-

> “5. The 1st Respondent then preferred Criminal Revision No. 883 of 1995 before the High Court of Madras. A learned single Judge by the impugned Order dated 20th July, 2000, set aside the conviction and acquitted the 1st Respondent on the ground that the appellant had not proved that the cheque dated 6th April, 1993 had been issued for any debt or liability.
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> 6. In our view the impugned Judgment cannot be sustained at all. The Judgment erroneously proceeds on the basis that the burden of proving consideration for a dishonored cheque is on the complainant. It appears that the learned Judge had lost sight of Sections 118 and 139 of the

Negotiable Instruments Act. Under Section 118, unless the contrary was proved, it is to be presumed that the Negotiable Instrument (including a cheque) had been made or drawn for consideration. Under Section 139 the Court has to presume, unless the contrary was proved, that the holder of the cheque received the cheque for discharge, in whole or in part of a debt or liability. Thus in complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable. However, the burden of proving that a cheque had not been issued for a debt or liability is on the accused. This Court in the case of Hiten P. Dalal v. Bratindranath Banerjee reported in (2001) 6 SCC 16 has also taken an identical view.

7. In this case admittedly the 1st Respondent has led no evidence except some formal evidence. The High Court appears to have proceeded on the basis that the denials / averments in his reply dated 21st May, 1993 were sufficient to shift the burden of proof onto the Appellant Complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The 1st Respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The 1st Respondent not having led any evidence could not be said to have discharged the burden cast on him. The 1st Respondent not having discharged the burden of proving that the cheque

was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct. The High Court erroneously set aside that conviction. “

29. The adequacy of evidence and its efficacy in respect of mandatory presumption under section 139 has now been well settled. It is a duty cast upon the accused to lead cogent and plausible evidence demolishing the presumption that the cheques were issued against some existing liability or debt. In the instant case the accused has not chosen to examine himself nor has he chosen to examine one of the signatory of the documents which he relies upon at exh.23. In respect of exhibit-23 document he has omitted to examine Bhupendrabhai Natwarlal Shah who is said to have signed document accepting the liability in respect Rs.8,61,000=00 towards the row house in question. Except exh. 23, which came to be produced with an application for production, no other evidence is produced on behalf of accused. The same is not proved as the deponent of affidavit is not examined by the accused. This document in itself can not be said to be significant enough for discharging the accused's burden of showing that the cheque in question were not

issued against any existing debt or liability.

30. Considering this document Ex. 23 against exh.9 purshish and exh.11, no reasonable man would have come to the conclusion that the accused has succeeded in discharging the liability of demolishing the mandatory presumption under section 139 of the Act.

31. The entire approach of the trial court as it appears from the judgment impugned is absolutely misconceived, perverse and has resulted into miscarriage of justice. The trial court has not appreciated the real purport of section 139 of the Negotiable Instrument Act. Section 139 of the Negotiable Instrument Act, as it is stated herein above, raises an obligation in the court examining the matter to raise a statutory mandatory presumption in favour of the complainant that the cheque were issued against existing debt or liability. This presumption is a presumption in law requires to be demolished by the accused with cogent evidence and unless & until the same is demolished, it can not be said that the accused has discharged his burden successfully. In the instant case, as can be seen from the record, the accused has

put up a lame defence of showing probability of complainant's case being false or created a doubt in case of the complainant based upon plausibility of the cheque being not issued against any existing liability or debt. The accused has not led any evidence whatsoever nor has he examined himself in the box nor has be chosen to examine any witness supporting his theory of cheque being not issued in discharge of any existing liability towards the complainant. As against this, the material on record are the accused's non denial of signature on the cheque / instrument, the accused's non denial of his signature on indemnity bond exhibit-16, the accused's non denial of signing exhibit -9. The mentioning of palpably false ground in Exh. 11 application for getting rid of admission at Exh. 9 purshish; would go long way to show that the accused has miserably failed in discharging his duty of leading the cogent and convincing evidence for dislodging the statutory mandatory presumption that the cheque were issued against existing liability towards the complainant. The trial court, therefore, has patently erred in considering that the complainant has not discharged his burden of establishing his case.

32. This misconception on the part of the trial court has resulted into miscarriage of justice which deserves to be rectified in the present acquittal appeal.

33. This Court is mindful of the fact that in the acquittal appeal unless & until it is established beyond doubt that there is miscarriage of justice the acquittal recorded by the trial Court may not be altered. In the instant case, this Court is constrained to observe that the trial Court has misconceived the Scheme of the Act and has proceeded on the footing as if it was the duty cast upon the complainant and the complainant only to prove his case beyond doubt relying upon the cardinal principle of Criminal Procedure Code. The Scheme of the Act and Section 139 of the Act makes it obligatory & mandatory upon the trial court to raise a mandatory presumption that the cheque were received against existing liability.

34.The contention of Shri. Patel, learned advocate of the accused that the bond at Ex. 16 contains infirmity like father's name of the accused was written with hand, the date of execution was not mentioned etc. and the contention with regard to

prosecution's failure in explaining the requirement of alteration on the date of one cheque are of no avail to the accused. The admission of the accused in purshish declaration at Exh. 9, as it is stated hereinabove, renders all other so called infirmity into insignificance. The Exh. 11 application contains ex facie improbable and incorrect grounds for withdrawing or resiling from the admission at Exh. 9. The tenor of Exh. 11 application itself would lead one to believe that the accused is in habit of making false statement and his theory for submitting Exh. 9 purshish was absolutely improbable.

35.Shri. Patel's submission that the matter may be remanded to the trial court for adjudication of Exh. 9 and 11 application deserves to be rejected in view of the fact that the very ground mentioned in Exh. 11 application makes it abundantly clear that the accused has not stated the correct facts and on absolutely improbable ground which can be proved ex facie incorrect. He wanted to resile from his own admission of liability. It requires no time to come to the conclusion that the reasoning advanced by the accused in application Exh. 11 for withdrawing the

purshish Exh.9 application was not only improbable but highly unbelievable and impracticable. More over, on the face of it, when accused has signed the Exh. 9 purshish atleast 4 places and when the same was corrected, it would not lie in the mouth of the accused to say that he had given signed blank paper to the opponent / complainant for the purpose of seeking adjournment. In view of this, no useful purpose would be served for remanding the matter for the purpose of deciding Exh. 11 application which in fact was not pressed at the relevant time by the accused and or his advocate.

36.The accused's admission time & again in respect of exhibit-9 purshish and his lame improbable defence against it advanced in exhibit-11 application would leave this Court with no scope but to come to the conclusion that the accused is guilty of the offence and, therefore, he deserves to be dealt with accordingly.

37. This Court having come to the conclusion that the judgment & order of acquittal passed by the trial Court deserves to be quashed and set aside, is of the

considered view that no fruitful purpose would be served in case the matter is remanded to the trail court for deciding purshish-11 application. As it is seen, the purshish -11 application contains ex facie improbable theory which deserves to be rejected forthwith. The aspect of awarding sentence and the compensation, in view of this Court, deserves to be left to the concerned trial court, as it would be required to give extensive opportunity to both the sides before an appropriate order of sentence could be made in this behalf. In view of this, this Court is of the view that the order impugned in this appeal deserves to be quashed and set aside and the matter deserves to be remanded back to the trial court for determining award of sentence and compensation if any, after affording an opportunity of hearing to both the sides within the stipulated time.

38. In the result, the appeal is partly allowed. Impugned judgment & order is quashed and set aside. For the reasons recorded in the judgment, the matter is remanded to the trial court only for the limited purpose as stated in the judgment and the trial Court is directed to give opportunity to both the sides and

decide the matter within a period of 2 months from the date of receipt of the writ from the court.

[S.R. BRAHMBHATT, J]

/vgn